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<b>R.H., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 12-1384</b>
	)	<b>Issued: May 22, 2013</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Ashland, KY, Employer</b>	)	
	)	

### Case Submitted on the Record

## DECISION AND ORDER

**RICHARD J. DASCHBACH**, Chief Judge  
**MICHAEL E. GROOM**, Alternate Judge  
**JAMES A. HAYNES**, Alternate Judge

On June 11, 2012 appellant, through counsel, filed a timely appeal from a May 3, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether OWCP properly terminated appellant's compensation for wage-loss compensation and medical benefits effective May 6, 2012 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a July 20, 2009 decision, the Board found that OWCP properly terminated appellant's compensation effective July 23, 2005 on the grounds that he no longer had any residuals or disability due to his accepted shoulder and low back conditions.<sup>2</sup> The Board found that OWCP properly relied upon the opinion of Dr. Richard T. Sheridan, a second opinion Board-certified orthopedic surgeon, in its October 26, 2007 and June 11, 2008 OWCP decisions. The Board also found that, following the termination of appellant's compensation, a conflict in medical opinion arose between Dr. Sheridan, the second opinion referral physician, and Dr. John W. Ellis, a treating Board-certified family practitioner, on the issue of whether appellant continued to have residuals of the accepted right shoulder and back conditions.<sup>3</sup> The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>4</sup>

On remand, OWCP reopened appellant's claim and accepted the conditions of right shoulder region joint pain, right shoulder adhesive capsulitis, right shoulder and arm sprain and lumbar or lumbosacral disc degeneration. It found that he was entitled to retroactive wage-loss compensation benefits on and after July 24, 2005.<sup>5</sup> OWCP placed appellant on the periodic rolls for temporary total disability effective December 1, 2009.

On June 15, 2011 Dr. James Aphrem, a treating osteopath, responded to OWCP's request for updated information on appellant's condition. He opined that appellant sustained a permanent aggravation of his preexisting condition and was disabled from his date-of-injury position.

In a September 7, 2011 report, Dr. E. Gregory Fisher, a second opinion Board-certified orthopedic surgeon, reviewed the employment and medical histories and provided findings on physical examination. He concluded that the accepted conditions of right shoulder adhesive capsulitis, right upper shoulder sprain and L5-S1 lumbar degeneration or lumbosacral intervertebral disc condition had resolved. Dr. Fisher addressed the lack of any objective findings. He concluded that appellant had no disability or continuing residuals due to his accepted May 29, 2002 employment injury.

On October 21, 2011 OWCP issued a notice proposing to terminate appellant's compensation benefits. It found the report of Dr. Fisher constituted the weight of the medical evidence.

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<sup>2</sup> Docket No. 08-2177 (issued July 20, 2009).

<sup>3</sup> On May 29, 2002 appellant, then a 47-year-old expeditor, filed a traumatic injury claim alleging that he injured his right shoulder while lifting a sack of mail out of a cart that day. OWCP accepted the claim for right shoulder joint pain, right shoulder adhesive capsulitis, aggravation of a lumbago and sprain/strain of the right upper arm/shoulder.

<sup>4</sup> Appellant stopped work on June 6, 2003 and has not returned. By letter dated October 23, 2003, OWCP placed appellant on the periodic rolls for temporary total disability.

<sup>5</sup> On October 1, 2009 appellant filed an election to be paid under FECA instead of OPM retirement benefits effective July 24, 2005.

In a letter dated November 8, 2011, appellant disagreed with the proposal to terminate his compensation benefits and submitted medical evidence supporting continuing residuals and disability.

An October 28, 2011 magnetic resonance imaging (MRI) scan revealed multilevel lumbar degenerative disc disease and facet osteoarthropathy compounded by underlying congenital central canal stenosis and L4-5 interval progress of disease.

In November 4, 2011 progress notes, Dr. Aphrem reported a history of hypertension coronary artery disease, arthritis, hyperlipidemia, anxiety, depression, gastroesophageal reflux disease and right knee pain. He provided physical findings and diagnosed low back pain. The physical examination revealed a normal range of motion. Dr. Aphrem opined that appellant's back pain complaints were supported by the October 28, 2011 MRI scan.

On December 12, 2011 OWCP referred appellant to Dr. Daniel D. Primm, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Fisher and Dr. Aphrem on appellant's ability to work and current disability status. The examination was scheduled for January 13, 2012.

On December 27, 2011 OWCP provided appellant's counsel with a computer printout regarding the selection of the impartial medical specialist. A MEO23 form listed nine physicians who were bypassed. A bypass history memorandum noted that five physicians did not accept OWCP referrals and one physician had moved out of the area. The bypass codes were listed as follows: "M" indicated that the physician was out of the area; "O" indicated other with an explanation note; and "D" indicated that the physician did not accept OWCP referrals. One physician was bypassed using the bypass code M because he had moved out of the zip code area and five were bypassed using the bypass code D because they did not accept referrals from OWCP. Three other physicians were bypassed using the bypass code D for other reasons which included requiring a prepay and no examination of backs.

In a January 17, 2012 report, Dr. Primm, reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He concluded that appellant no longer had any residuals or disability due to the accepted May 29, 2002 employment injuries. Dr. Primm diagnosed lumbar sprain which possibly temporarily aggravated a preexisting chronic degenerative condition, right shoulder sprain, right rotator cuff tear and adhesive capsulitis. On examination, there was no palpable muscle tightness or spasm in the thoracolumbar spine, no tenderness at the sacroiliac joint and good thoracolumbar range of motion. The right shoulder showed range of motion equal to the left shoulder, no tenderness over the scapular muscles or posterior and lateral aspects of the shoulder, no weakness or pain, some mild crepitus over the acromioclavicular joint and no localized tenderness of the acromioclavicular joint. Dr. Primm concluded that appellant's lumbar sprain had possibly temporarily aggravated a chronic preexisting degenerative condition and that the lumbar sprain had resolved. As to the lumbar spine, he related that multiple magnetic imaging scans showed no traumatic conditions, but only degenerative changes. Dr. Primm opined that appellant's right shoulder adhesive capsulitis, sprain and rotator cuff tear had also resolved, as there were no signs of any residual shoulder pathology. He stated that appellant's subjective complaints were disproportionate to the objective findings. Dr. Primm opined that appellant no longer had any disability or residuals

from the accepted May 29, 2002 employment injury. He concluded that appellant was capable of working a limited-duty or sedentary position. The work restrictions noted by Dr. Primm were due to appellant's chronic lumbar degenerative and bilateral total knee replacements and unrelated to the accepted employment conditions. Dr. Primm stated that appellant's age, deconditioning and obesity were also factors in his work restrictions.

By decision dated May 3, 2012, OWCP finalized the termination of appellant's compensation benefits effective May 6, 2012.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>6</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>7</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>9</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>10</sup>

Section 8123(a) of FECA provides in pertinent part: if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>11</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>12</sup>

### **ANALYSIS**

Following the Board's July 20, 2009 decision, OWCP accepted appellant's claim for right shoulder region joint pain, right shoulder adhesive capsulitis, right shoulder and arm sprain

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<sup>6</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>7</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>8</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>9</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>10</sup> *Kathryn E. Demarsh*, *supra* note 9; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>11</sup> 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>12</sup> *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

and lumbar or lumbosacral disc degeneration. By letter dated February 12, 2010, it placed him on the periodic rolls for temporary total disability effective December 1, 2009.

Dr. Aphrem, a treating osteopath, opined that appellant sustained a permanent aggravation of his preexisting conditions and was disabled from his date-of-injury position. Dr. Fisher, a second opinion Board-certified orthopedic surgeon, concluded that appellant no longer had any residuals or disability due to his accepted work injuries. OWCP found a conflict between Dr. Aphrem and Dr. Fisher, and selected Dr. Primm, a Board-certified orthopedic surgeon, as impartial medical examiner. In his January 7, 2012 report, Dr. Primm concluded that appellant no longer had any residuals or disability due to his accepted May 29, 2002 employment injuries. Based on his opinion OWCP terminated appellant's compensation and medical benefits effective May 6, 2012.

On appeal, counsel argued that OWCP's May 3, 2012 decision should be set aside and the case remanded for further medical development. He stated that the record did not establish that Dr. Primm was properly selected under the Physicians Directory System (PDS) as only three bypass sheets were available for the 10 physicians that were allegedly randomly selected. Counsel also noted that it was unclear why a doctor who was over 100 miles from appellant's residence was selected.

Based on the conflict in medical opinion, OWCP referred appellant to Dr. Primm for an impartial medical evaluation. The Board notes that OWCP no longer utilizes the PDS for scheduling impartial medical evaluations. At the time OWCP found a conflict in the medical opinion evidence on December 12, 2011, it had implemented its iFECS-based Medical Management application.<sup>13</sup> In *R.C.*,<sup>14</sup> the Board reviewed the Director's delegated authority to appoint physicians to perform medical examinations in situations in which a conflict in opinion arises under section 8123 of FECA. Under the new procedures, a medical scheduler puts the claim number into the application, from which appellant's home zip code is loaded. The scheduler chooses the type of examination to be performed and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered. Upon entry of this information, the application prompts the Form ME023.

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<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (July 2011). The application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.

<sup>14</sup> Docket No. 12-468 (issued October 5, 2012).

The record includes an imaged copy of a December 5, 2011 iFECS Report: ME023 -- Appointment Schedule Notification which FECA procedure manual provides is documentation that the medical management application was used that day to select Dr. Primm as the impartial specialist.<sup>15</sup>

The record also includes bypass notes from December 5, 2011 which establish that the medical scheduler attempted to schedule an impartial medical examination with nine other physicians, but was unsuccessful. The scheduler noted that she made contact with several doctors who did not accept referrals from OWCP, which was indicated under bypass code of "D" and one who had moved out of the zip code, which was indicated under the bypass code of "M." The bypass notes relate that the remaining three physicians were not chosen using the bypass code of "O" because they either required a prepay or did not perform back examinations. Dr. Primm was next on the list and, thus, he was selected as the impartial medical examiner. Appellant has not submitted any evidence that Dr. Primm was improperly selected or that there was any bias in the selection of Dr. Primm.

Based on the evidence of record, the Board finds that OWCP properly utilized the Medical Management Application to refer appellant to Dr. Primm for examination.

The Board finds that Dr. Primm's report was entitled to the special weight of the medical evidence. Dr. Primm provided a detailed report reviewing the medical records and noting that the accepted conditions had resolved based on the normal range of motion and lack of any pathological findings. He explained why he determined that appellant's current restrictions were not due to his employment as the accepted conditions had resolved. Dr. Primm attributed appellant's current work restrictions to his chronic lumbar degenerative changes and bilateral knee. He also opined that any disability was also due to appellant's age, deconditioning and obesity. As Dr. Primm's report is based on a proper factual history, provided findings and included medical reasoning, supporting his conclusions, the Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds OWCP met its burden of proof to terminate appellant's compensation benefits effective May 6, 2012.

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<sup>15</sup> The ME023 report can only be generated through the medical management application and serves as documentary evidence that the referee appointment was scheduled through the use of the rotational system in the medical management application. *See supra* note 13 at Chapter 3.500.5g. The FECA Procedure Manual further provides that the medical scheduler should image a copy of the ME023 report into the case file to substantiate that the rotational system was used to select the physician. *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 3, 2012 is affirmed.

Issued: May 22, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board